



IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. _____

86-1509

JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

v.

CARL A. JONES, S.J. KING, and FRANK W. PHILLIPS,
Comprising the **ALCOHOLIC BEVERAGE COMMISSION OF**
THE STATE OF TENNESSEE; E. LEE HYDEN, Director of the
ALCOHOLIC BEVERAGE COMMISSION OF THE STATE
OF TENNESSEE; LIPMAN BROS., INC., and
SOUTHERN DISTRIBUTORS CORP.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF TENNESSEE

JURISDICTIONAL STATEMENT

THOMAS WARDLAW STEELE

JOEL M. LEEMAN

230 Fourth Avenue, North
Nashville, Tennessee 37219

Attorneys for Appellant.

Of Counsel:

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

TABLE OF CONTENTS

Page

OPINION BELOW	2
JURISDICTION	2
THE REGULATION INVOLVED	3
QUESTIONS PRESENTED	4
STATEMENT OF THE CASE	5
THE QUESTIONS ARE SUBSTANTIAL	7
APPENDIX A — Opinion of the Circuit Court of Davidson County, Tennessee	1a
APPENDIX B — Opinion and Judgment of the Court of Appeals of Tennessee	4a
APPENDIX C — Order of the Supreme Court of Tennessee Denying the Writ of Certiorari	26a
APPENDIX D — Notice of Appeal	27a

TABLE OF AUTHORITIES

Cases:

<i>American Railway Express Co. v. Levee</i> , 263 U.S. 19 (1923)	3, 15
<i>Appleby v. Delaney</i> , 271 U.S. 403 (1926)	10
<i>Armstrong v. Manzo</i> , 380 U.S. 545 (1965)	11
<i>Block v. Thompson</i> , 472 F.2d 587 (5th Cir. 1973)	11
<i>Brown-Forman Distillers Corp. v. Stewart</i> , 520 S.W.2d 1 (1975)	10
<i>Clark v. City of Fremont, Nebraska</i> , 377 F. Supp. 327 (D. Neb. 1973)	11
<i>Hamilton v. Regents of University of California</i> , 293 U.S. 245 (1934)	3, 14
<i>Hudson Distributors, Inc. v. Eli Lilly & Co.</i> , 377 U.S. 386 (1964)	3
<i>International Railway Co. v. Davidson</i> , 257 U.S. 506 (1922)	13
<i>King Manufacturing Co. v. Augusta</i> , 277 U.S. 100 (1928)	3, 14

(ii)

<i>Cases, continued:</i>	<u>Page</u>
<i>M. Kraus & Brothers v. United States</i> , 327 U.S. 614 (1946).....	10
<i>Lathrop v. Donohue</i> , 367 U.S. 820 (1961)	3, 14
<i>Live Oak Association v. Railroad Commission</i> , 269 U.S. 354 (1926)	3, 14
<i>Small Company v. American Sugar Refining Co.</i> , 267 U.S. 232 (1925)	10
<i>Sultan Railway & Timber Co. v. Department of Labor & Industry</i> , 277 U.S. 135 (1928)	3, 14
<i>Terry v. Evans</i> , 189 Tenn. 345, 225 S.W.2d 255 (1949)	13
<i>Thompson v. Consolidated Gas Utilities Corporation</i> , 300 U.S. 55 (1937)	13
<i>United States Brewers' Association, Inc. v. State of Nebraska, et al.</i> , 192 Neb. 328, 220 N.W.2d 544 (1974)	10, 14
<i>Vintage Imports, Ltd, v. Joseph E. Seagram & Sons, Inc.</i> , 409 F. Supp. 497 (E.D. Va. 1976)	11
<i>Williams v. Bruffy</i> , 96 U.S. 176 (1878)	3, 14
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971)	10
 <i>Statutes:</i>	
§16-411 Tennessee Code Annotated.	3
Title 23, Chapter 11, Tennessee Code Annotated	2
Title 27, Chapters 8 and 9, Tennessee Code Annotated	2
§27-819, Tennessee Code Annotated	7
§57-818, Tennessee Code Annotated	4
28 U.S.C.A. §1257(2)	3
 <i>Regulations:</i>	
§0100-3.13(7). Local Option Liquor Rules & Regulations, Alcoholic Beverage Commission of the State of Tennessee, published in Vol I, Official Compilation, Rules & Regulations of the State of Tennessee Control No. 0100, p. 24	3, 4, 6

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

JOSEPH E. SEAGRAM & SONS, INC.,

Appellant,

v.

CARL A. JONES, S.J. KING, and FRANK W. PHILLIPS,
Comprising the ALCOHOLIC BEVERAGE COMMISSION OF
THE STATE OF TENNESSEE; E. LEE HYDEN, Director of the
ALCOHOLIC BEVERAGE COMMISSION OF THE STATE
OF TENNESSEE; LIPMAN BROS., INC., and
SOUTHERN DISTRIBUTORS CORP.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Tennessee, entered on September 3, 1976, reversing the judgment of the Circuit Court of Davidson County, Tennessee granting a summary judgment in favor of the Appellant. The judgment appealed from became

final on February 7, 1977. The Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

Neither the Opinion of the Circuit Court of Davidson County, Tennessee nor that of the Court of Appeals of Tennessee are reported. The Opinion of the Circuit Court of Davidson County, Tennessee is appended to this Statement as Appendix A hereto. The Opinion of the Court of Appeals and the judgment entered pursuant to that Opinion are appended to this Statement as Appendix B hereto. The order of the Supreme Court of Tennessee denying Appellant's petition to that Court for the Writ of Certiorari is appended hereto as Appendix C.

JURISDICTION

This suit was brought under the provisions of Title 23, Chapter 11 and Title 27, Chapters 8 and 9, Tennessee Code Annotated, seeking review of a decision of the Alcoholic Beverage Commission of the State of Tennessee, denying to the Appellant permission to transfer the wholesale distributorship of a brand of alcoholic beverage which it markets and, further, seeking from the Court a judgment as to the Constitutionality of the regulation by which the Commission purports to exercise authority to control a distiller's ability to transfer a wholesale distributorship from one firm to another and to require its permission as a prerequisite to such a transfer.

The judgment of the Court of Appeals of Tennessee, from which this appeal is taken, was entered on September 3, 1976, and the judgment of the Supreme Court of Tennessee denying Appellant's Petition for the Writ of Certiorari was entered on February 7, 1977.

Under applicable Tennessee law, the judgment of the Court of Appeals did not become final until the Supreme Court declined to grant the Writ of Certiorari in this case. Tennessee Code Annotated §16-411. Notice of Appeal was filed with the Court of Appeals of Tennessee on March 15, 1977, and a copy of that Notice of Appeal is appended to this Statement as Appendix D hereto.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C.A. §1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment in this case on direct appeal: *Williams v. Bruffy*, 96 U.S. 176 (1878); *Live Oak Association v. Railroad Commission*, 269 U.S. 354 (1926); *King Manufacturing Co. v. Augusta*, 277 U.S. 100 (1928); *Sultan Railway & Timber Co. v. Department of Labor & Industry*, 277 U.S. 135 (1928); *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934); *Lathrop v. Donohue*, 367 U.S. 820 (1961); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964); *American Railway Express Co. v. Levee*, 263 U.S. 19, (1923).

THE REGULATION INVOLVED

This appeal concerns the validity of Section 0100-3.13(7) of the Local Option Liquor Rules & Regulations promulgated by the Alcoholic Beverage Commission of the State of Tennessee, the text of which is as follows:

(7) Approval Required to Transfer to Another Wholesaler.—No manufacturer, importer or other person shall be permitted to transfer a brand from one wholesale distributor to another without written approval of the Commission. Requests for approval of a transfer must be submitted in writing and a copy of said request must at the same time be

sent to the wholesale distributor in whose name the brand is then registered.

After due consideration, the Commission shall either approve or disapprove the transfer. If the Commission disapproves the transfer, the brand shall remain in status quo, and failure on the part of the manufacturer or importer so denied to ship his wholesaler a reasonable amount of the brand sought to be transferred will result in the withdrawal of approval of all its brands. Vol. I, Official Compilation, Rules and Regulations of the State of Tennessee, Control No. 0100 p. 24.

The promulgation of this Regulation was based upon the general regulatory authority conferred upon the Alcoholic Beverage Commission by Tennessee Code Annotated §57-818. No statutes of the state of Tennessee specifically require or authorize the Alcoholic Beverage Commission to regulate the transfer of distributorships from one wholesaler to another.

QUESTIONS PRESENTED

1. Whether a State Agency which regulates the sale and distribution of alcoholic beverages within the state may, consistent with the requirements of Due Process of Law imposed by the Fifth and Fourteenth Amendments to the United States Constitution, publish and enforce a regulation which requires the Agency's permission before a distiller may transfer the distributorship of a brand of alcoholic beverage from one wholesaler to another, which regulation provides no information whatever to apprise applicants for such permission of the standards and criteria which will be utilized by the Agency in evaluating and acting upon their application and contains no guidelines for the Agency to follow in deciding whether to grant or deny such permission.

2. Whether a State Agency which regulates the sale and distribution of alcoholic beverages within the state may, consistent with the requirements of Due Process of Law imposed by the Fifth and Fourteenth Amendments to the United States Constitution, promulgate and enforce a regulation, not expressly authorized by the statute creating the Agency and defining the scope of its powers, prohibiting distillers from transferring the distributorship of a brand of alcoholic beverage from one wholesaler to another without the Agency's permission, which regulation is not in any way reasonably related to the statutorily prescribed regulatory function of that Agency and which, further, is not reasonably related to, nor required for the public health, safety and welfare.

STATEMENT OF THE CASE

The Appellant is a distiller and marketer of alcoholic beverages, which is engaged in that business within the State of Tennessee. In November, 1974, the Appellant applied to the Alcoholic Beverage Commission of the State of Tennessee for formal permission to transfer the distributorship of a certain brand of alcoholic beverage which it markets from the distributors who had previously handled this product in the Chattanooga, Tennessee and Nashville, Tennessee areas to two other distributors. As set forth on the face of this application, the basis for this request was that the national sales responsibility for this particular brand had been transferred from one division of the Appellant corporation to another division, and the purpose of transferring this particular brand from one distributor to another was to comply with the Appellant's long-standing policy of having all brands assigned to a particular division distributed by the same wholesaler in a particular geographic area.

This application was submitted pursuant to §0100-3.13(7) Local Option Liquor Rules & Regulations published by the Alcoholic Beverage Commission of the State of Tennessee, the text of which regulation has been set forth verbatim hereinabove in this Statement. A hearing was held on Appellant's application, and on January 10, 1975 this application was denied by the Alcoholic Beverage Commission. Although the decision to deny this application was reduced to writing, no reason for the action taken was set forth in the written decision of the Commission.

Subsequently, the Appellant filed suit in the Circuit Court of Davidson County, Tennessee, seeking a judicial review of the action of the Commission and a declaratory judgment regarding the Constitutionality of the regulation by which the Commission purported to control the Appellant's right to transfer the distributorship of a particular brand from one wholesaler to another. In the Complaint filed in this cause, which was the original pleading by which the suit was initiated, the Appellant asserted that the regulation in question was violative of the Fifth and Fourteenth Amendments of the United States Constitution and prayed the Court for a Declaratory Judgment to that effect. (Technical Record 4-7).

The Circuit Court of Davidson County, Tennessee granted the Appellant's Motion for Summary Judgment in this cause, holding that the regulation, as written, violated Due Process of Law as guaranteed to the Appellant by both the Federal and State Constitutions. (Technical Record 44).

All of the Defendants prayed for, were granted and perfected an appeal, which appeal was considered by the Court of Appeals of Tennessee. One of the Assignments of Error filed on appeal by all three of the Defendants was that the Circuit Court of Davidson County,

Tennessee had erred in holding that the regulation before the Court was violative of the Due Process Clause of the United States Constitution. The Court of Appeals sustained this Assignment of Error and reversed the decision of the Circuit Court of Davidson County, Tennessee on that ground. (Opinion, Court of Appeals, page 18).

Subsequent to the decision of the Court of Appeals, the Appellant filed a Petition for the Writ of Certiorari directed to the Supreme Court of Tennessee, praying that that Court take jurisdiction of this cause and grant a full hearing on the merits. The filing of this Petition was the only available procedural device at that stage of the proceeding whereby the Appellant could obtain further Appellate review of the decision of the Court of Appeals of Tennessee. Tennessee Code Annotated §27-819. On February 7, 1977 the Supreme Court of Tennessee denied this Petition for the Writ of Certiorari. As previously set forth, upon the Supreme Court's denial of the Appellant's Petition for the Writ of Certiorari, the decision of the Court of Appeals of Tennessee became final and, on March 15, 1977, the Appellant filed a Notice of Appeal with the Court of Appeals of Tennessee. (A copy of which is Appendix D hereto.)

THE QUESTIONS ARE SUBSTANTIAL

1. The issues involved in this appeal are of importance, not only to those engaged in the Alcoholic Beverage Industry but to all other individuals or business entities which are directly affected by the regulations of administrative agencies and whose freedom to conduct their personal or business affairs is circumscribed by the regulations of administrative agencies and actions taken by those agencies pursuant to such regulations.

The first, and perhaps the most critical issue involved in this appeal, is, in essence, whether an administrative agency may confer upon itself a right to regulate a particular activity in a wholly arbitrary and capricious manner by issuing a regulation which confers upon that agency the right to regulate a particular activity but defines no standards or criteria to be employed by the agency in exercising this regulatory function and, further, provides no guidance to those directly affected by this regulatory power with respect to how they may obtain the agency's permission to take an action which is necessary to carrying out their business responsibilities, which action they would have every right to take in the absence of that regulation. This is a very substantial issue going to the essence of the relationship between an administrative agency and those who are subject to its regulations and one which is worthy of this Court's very serious consideration.

Even if one may assume, *arguendo*, that an administrative agency may properly limit the Appellant's right to choose its distributors freely, there is, nevertheless, a very basic defect in the manner in which the Alcoholic Beverage Commission of the State of Tennessee has chosen to regulate the exercise of this right. The regulation which that agency actually published contains no criteria whatever for use by members of the Commission in acting upon applications for permission to transfer distributorships from one wholesaler to another and, further, while this regulation ostensibly affords to a distiller the right to be heard and present evidence in support of an application, this opportunity to be heard is effectively rendered illusory by the fact that the regulation provides a potential applicant with absolutely no guidance regarding what factors must be shown to satisfy the Commission that its permission for any particular transfer should be granted.

Without any guidelines regarding the elements which must be established in order to justify a transfer, an applicant is effectively unable to marshal and present evidence in support of his application. Absent guidance as to what sort of evidence must be presented to the Commission in support of such an application, the applicant must engage in a sort of "guessing game," in which he must choose among a myriad of possibilities as to what sort of showing must be made and what sort of evidence must be presented in order to satisfy the Commission that the applicant should be allowed to transfer a particular distributorship. The only language in this regulation which in any way purports to define the scope of the agency's review of such applications is tantamount to a dictionary definition of whim and caprice in that the regulation simply provides that "*after due consideration* the Commission shall either approve or disapprove the transfer." (Emphasis added).

2. The Circuit Court of Davidson County, Tennessee, in granting the Appellant's motion for summary judgment, held that the regulation in question violated the requirements of Due Process of Law imposed by the Fifth and Fourteenth Amendments to the United States Constitution, and aptly summarized the defects in the regulation in the following observation:

"This particular regulation, in its present form, cannot be upheld. A manufacturer has no way of knowing what conditions will permit or prevent a transfer. What will influence the decision of the Commission? . . .

. . . the regulation now stricken permits important rights and freedoms to be subjected to the personal whim of a Commissioner without standards or guideposts of any kind." (Technical Record 44).

3. The Trial Court's disposition of this case is amply supported by decisions of this Court and lower Federal and State Courts. It is an established principle that a State's power to regulate the sale and consumption of alcoholic beverages does not extend so far as to permit the State, in acting pursuant to such power, to contravene the requirements of Due Process of Law. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). Further, the requirement that a statute, in order to afford Due Process of Law, must not be so vague and indefinite as to be incapable of understanding is not limited to statutes which carry criminal sanctions for their violation but applies with equal force to a statute which affects only contractual rights or other property rights. *Small Company v. American Sugar Refining Company*, 267 U.S. 232 (1925). Regulations of an administrative agency which are legislative in nature and have the force of law are subject to the same tests with respect to meeting the requirements of the Constitution as a statute designed to accomplish the same purpose. *M. Kraus & Brothers v. United States*, 327 U.S. 614 (1946); *Appleby v. Delaney*, 271 U.S. 403 (1926).

The highest Courts of two states, applying these basic principles to provisions substantially identical to the regulation involved in this appeal (in one case a statute was involved, and in the other instance the provision before the Court was an administrative regulation which required permission for the transfer of a distributorship of alcoholic beverages) held that these measures failed to define adequately the criteria for granting or denying permission for a transfer of distributorships and were, therefore, violative of Due Process of Law. *United States Brewers' Association, Inc. v. State of Nebraska, et al*, 192 Neb. 328, 220 N.W.2d 544 (1974); *Brown-Forman Distillers Corp. v. Stewart*, 520 S.W.2d 1 (1975).

Further, in an extremely pertinent decision, the United States Court of Appeals for the Fifth Circuit held that a city ordinance which required a public hearing as a prerequisite to allowing a retail liquor store owner to transfer his store from one location in the city to another was invalid because the ordinance failed "to set forth sufficiently specific objective criteria as to the basis for allowing or disallowing a transfer." And the Court further aptly remarked that "the idea of a hearing is fine, but what is to be heard?" *Block v. Thompson*, 472 F.2d 587, 588 (5th Cir. 1973). In other recent cases the Federal Courts have struck down statutes and local ordinances which have attempted to regulate the right to engage in the sale and distribution of alcoholic beverages without setting forth meaningful standards regarding the conduct permitted or proscribed for the guidance of those being regulated. See, e.g. *Vintage Imports, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 409 F. Supp. 497 (E.D. Va. 1976); *Clark v. City of Fremont, Nebraska*, 377 F. Supp. 327 (D. Neb. 1973).

Prior decisions of this Court have also established that, in order to satisfy the requirements of Due Process of Law, the opportunity to be heard must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545 (1965). Unless a party is afforded reasonable notice of what the relevant issues at a hearing will be, the right to be heard is, in fact, meaningless and, thus, the regulation in question denies to those whom it affects their right to Due Process of Law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

4. In view of this considerable body of authority, it is respectfully submitted that this question is a substantial one which involves very serious Constitutional issues. Further, while this case has arisen in the context of a

State's exercise of its power to regulate the alcoholic beverage industry, the Constitutional implications of this issue are by no means limited to that particular industry. Rather, the essential question in this case is whether an administrative agency may confer upon itself an authority to regulate the personal and business affairs of individuals and business entities and deny to those being regulated any information regarding the manner in which that regulatory authority will be administered and the factors which must be shown in order to obtain a favorable determination from the agency in its exercise of that authority. The broad implications of this question for the social and economic structure of this country warrant a definitive statement by this Court with regard to the scope of an agency's right to confer upon itself regulatory authority without defining standards and criteria for the exercise of that authority.

5. A distinct but closely related issue is whether the existence of this regulation in and of itself constitutes a violation of Due Process of Law inasmuch as the regulation is not reasonably related to, nor required for the public health, safety and welfare. The Court of Appeals, in its Opinion, found that, under applicable Tennessee procedural law, it was conclusively determined, for the purposes of this litigation, that the State could present no evidence regarding an underlying purpose for the regulation, inasmuch as there had not been put before the Court, by affidavit, deposition, or otherwise, any evidence in opposition to the Appellant's Motion for Summary Judgment. (Court of Appeals Opinion, 13,14).

Thus, the Court of Appeals determined that the Trial Court had acted properly in disposing of this case based solely upon an examination of the language of the regulation. However, the Court nevertheless reversed the

decision of the Trial Court, relying principally upon the prior Tennessee decision in *Terry v. Evans*, 189 Tenn. 345, 225 S.W.2d 255 (1949) as supporting the proposition that "no provision for regulation of sale and distribution of intoxicating liquor is beyond the State police power." (Court of Appeals Opinion, 18).

6. The approach to the relationship between the scope of an administrative agency's power to regulate and the guaranties of the Constitution which is illustrated by the Court of Appeals' disposition of this case is wholly untenable. This approach is particularly inappropriate when one considers that the Legislature of Tennessee has never expressly or impliedly regulated, nor in any way limited the right of a distiller to transfer distributorships from one wholesaler to another. The adoption of the regulation before the Court was based solely upon the exercise by the Alcoholic Beverage Commission of what it felt were its implied prerogatives to regulate the Alcoholic Beverage Industry.

7. This "carte blanche" approach to the regulatory authority of the Alcoholic Beverage Commission is in direct contravention of numerous decisions of this Court. It has been established repeatedly that an administrative agency may not act arbitrarily and capriciously in the enactment of rules and regulations pursuant to the authority delegated to it by a legislative body. In order to satisfy the requirements of Due Process of Law, such regulations must be both reasonable and reasonably related to the statutory authority granted to the agency. *Thompson v. Consolidated Gas Utilities Corporation*, 300 U.S. 55 (1937); *International Railway Company v. Davidson*, 257 U.S. 506 (1922).

Further, in at least one reported decision, a Court has held that a statute imposing upon distillers a requirement substantially identical to that imposed by the regulation

before this Court in this case lacked a reasonable relationship to the public health, safety and welfare and therefore was violative of the United States Constitution. *United States Brewers' Association, Inc. v. State of Nebraska, et al*, 192 Neb. 328, 220 N.W.2d 544 (1974).

In view of these authorities, it is respectfully submitted that the Court of Appeals of Tennessee was in error in holding, as it did, that the power of an administrative agency to regulate the sale and distribution of alcoholic beverages is unlimited and not in any way restrained by the requirements of the United States Constitution. Such a proposition is untenable on its face.

8. This Court clearly has jurisdiction to hear this case on direct appeal. The regulation before the Court on this appeal is one which involves an attempt by the Alcoholic Beverage Commission to engage in legislative or rule-making activities and, further, this is an enactment to which the State of Tennessee gives the force of law. Thus, based upon a long line of decisions, this regulation is properly to be considered a "statute" for purposes of this Court's jurisdiction to hear this case on direct appeal pursuant to 28 U.S.C.A. §1257(2). *Williams v. Bruffy*, 96 U.S. 176 (1878); *Live Oak Association v. Railroad Commission*, 269 U.S. 354 (1926); *King Manufacturing Co. v. Augusta*, 277 U.S. 100 (1928); *Sultan Railway & Timber Co. v. Department of Labor & Industry*, 277 U.S. 135 (1928); *Hamilton v. Regents of University of California*, 293 U.S. 245 (1934); *Lathrop v. Donohue*, 367 U.S. 820 (1961).

Further, the Appellant specifically asserted, in the initial pleading filed in this cause, that the regulation violates its rights under the Fifth and Fourteenth Amendments to the United States Constitution. This position was sustained by the Trial Court and, on appeal, the Court of Appeals expressly affirmed the validity of

this regulation. In view of the manner in which the Constitutional issue was presented to the Courts below and the fact that the validity of this regulation was upheld as against a Constitutional attack by the Court of Appeals, it is respectfully submitted that this Court has jurisdiction, pursuant to 28 U.S.C.A. §1257(2), to hear and determine this case on direct appeal. An appeal was noticed and perfected within ninety days after the declination by the Supreme Court of Tennessee to hear this case so that this appeal is timely. *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923).

9. The regulation before the Court on this appeal suffers from two extremely serious Constitutional infirmities. Not only is this regulation unrelated to the requirements of public health, safety and welfare, but further, the wording of the regulation affords no notice to those affected by its provisions as to the manner in which this power will be administered, and does not provide any standards for the Commission's administration of the regulatory authority which it has thus assumed. The net effect of this regulation is that the Commission has conferred upon itself, on its own prerogative and without statutory sanction, the right to determine, solely according to its own whim and caprice, whether a distiller may select distributors according to what it sees as its valid business interests or whether it will be forced to permit its brands to be distributed by firms with whose performance it is not satisfied. It is respectfully submitted that, in view of the fact that an adequate sales distribution system is absolutely essential to the success of a distiller, or, for that matter, any firm engaged in marketing a product, the right being regulated is far too important to be subjected to arbitrary control by an administrative agency.

It is further submitted that the questions of the extent of an administrative agency's power to regulate business activities, the relationship which such regulation must have to the public health, safety and welfare and the additional question of what limiting standards must be included in such a regulation to prevent the arbitrary exercise of the agency's powers and to afford reasonable notice and a fair opportunity to be heard to those being regulated, are of such far-reaching importance as to be worthy of full briefing, oral argument and consideration by this Court.

Respectfully submitted,

THOMAS WARDLAW STEELE

JOEL M. LEEMAN

230 Fourth Avenue, North
P.O. Box 2757
Nashville, Tennessee 37219
Attorneys for Appellants.

Of Counsel:

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

APPENDIX

APPENDIX A

IN THE SIXTH CIRCUIT COURT OF
DAVIDSON COUNTY, TENNESSEE

NO. B-16415
MINUTE BOOK 17-C, PAGE 2356

SEAGRAM DISTILLERS COMPANY

VS.

CARL A. JONES, ET AL

ORDER ON MOTION FOR SUMMARY JUDGMENT

This cause came on to be heard upon plaintiff's motion for summary judgment "to the effect that the action of the Alcoholic Beverage Commission in refusing to it permission to transfer certain wholesale distributorships, as alleged in the complaint . . . is void as being in excess of the lawful powers of that administrative agency or, alternatively, that such action denied to the plaintiff rights guaranteed under the Constitution of the United States and the State of Tennessee."

The action involved was taken pursuant to a regulation which was stipulated by all parties to be in these words:

"(7) Approval Required to Transfer to Another Wholesaler.—No manufacturer, importer or other person shall be permitted to transfer a brand from one wholesale distributor to another without written approval of the Commission. Requests for approval of a transfer must be submitted in writing and a copy of said request must at the same time be sent to the wholesale distributor in whose name the brand is then requested.

After due consideration, the Commission shall either approve or disapprove the transfer. . ."

If it be unclear, the above refers to the marketing of liquor and the word "brand" refers to a particular brand of liquor.

The motion for summary judgment can only be granted if the above quoted regulation, read in conjunction with the Statutes relating to liquor, is in violation of a Constitution on its face. The Court is of the opinion that the regulation does violate the due process clauses of both the Federal and State Constitutions.

A careful search of the Statutes reveals no provision regulating the relationship between manufacturer and wholesaler. Nothing is required of the relationship. No standards for sales, contracts, or dealings are stated.

While the authority of the ABC to regulate on this subject might be inferred, this particular regulation, in its present form, cannot be upheld. A manufacturer has no way of knowing what conditions will permit or prevent a transfer. What will influence the decision of the Commission?

We say we have a government of laws and not men. Although some ridicule this principle, it is important and should be applied whenever possible. It is applied in this case for the regulation now stricken permits important rights and freedoms to be subjected to the personal whim of a Commissioner without standards or guideposts of any kind.

The motion for summary judgment is granted.

It appears to the Court that the maintenance of the status quo will not cause any irreparable loss. It is, therefore, ORDERED that, for the full protection of rights of appeal, the plaintiff will make no change in its distributor relationship for a period of sixty (60) days.

This decision is based upon the Statutes, the stipulated regulation and principles of law. Therefore, an appeal is

granted to the Supreme Court upon proper bonds being filed.

Enter this 12th day of January, 1976.

/s/James M. Swiggart
JAMES M. SWIGGART
JUDGE

APPENDIX B

SEAGRAM DISTILLERS COMPANY, a Division
of JOSEPH E. SEAGRAM & SONS, INC.,

Plaintiff-Appellee

VS.

CARL A. JONES, S.J. KING and FRANK W.
PHILLIPS, Comprising the ALCOHOLIC BEV-
ERAGE COMMISSION OF THE STATE OF TENN-
ESSEE; E. LEE HYDEN, Director of the ALCO-
HOLIC BEVERAGE COMMISSION OF THE
STATE OF TENNESSEE; LIPMAN BROS. INC.;
and SOUTHERN DISTRIBUTORS CORP.

Defendants-Appellants

DAVIDSON LAW

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM CIRCUIT COURT OF DAVIDSON
COUNTY, TENNESSEE

HONORABLE JAMES M. SWIGGART, JUDGE

FILED: Sept. 3, 1976

THOMAS WARDLAW STEELE and JOEL M. LEEMAN
GULLETT, STEELE, SANFORD, ROBINSON &
MERRITT, Home Federal Building, Nashville, Tennes-
see, ATTORNEYS FOR PLAINTIFF-APPELLEE

HONORABLE R. A. ASHLEY, JR., ATTY. GENERAL,
STATE OF TENNESSEE, WILLIAM C. KOCH, JR.,
Assistant Attorney General, Supreme Court Building,
Nashville, Tennessee, ATTORNEYS FOR APPEL-
LANT TENNESSEE ALCOHOLIC BEVERAGE COM-
MISSION

DANIEL W. OEHMIG, 909 American Natl. Bank Bldg.,
Chattanooga, Tennessee, ATTORNEY FOR DEFEND-
ANT-APPELLANT SOUTHERN DISTRIBUTORS
CORP.

TYREE B. HARRIS, HOOKER, KEEBLE, DODSON &
HARRIS, Nashville Trust Building, Nashville, Tennes-
see, ATTORNEYS FOR DEFENDANT-APPELLANT
LIPMAN BROS., INC.

THOS. A. SHRIVER
PRESIDING JUDGE

REVERSED AND REMANDED

OPINION

- The Case -

This is an appeal by the Tennessee Alcoholic Beverage Commission and other named defendants from the action of Honorable James M. Swiggart, Judge of the Sixth Circuit Court of Davidson County, Tennessee, in granting a motion for summary judgment and entering an order holding that Rule No. 0100-3-.13(7) of the Rules of the Tennessee Alcoholic Beverage Commission violates the due process clauses of the Federal and State Constitu-
tions and, hence, is void.

- The Pleadings and Proceedings Below—

On March 7th, 1975, Seagram Distillers Company filed its "Original Complaint and Petition for Writ of Certiorari" in the Circuit Court of Davidson County, seeking a review of the decision of the Alcoholic Beverage Commission wherein the request of petitioner to transfer its distributorship of certain brands of vodka was denied.

The petition also prayed for a declaratory judgment as to the rights of the parties.

Said complaint, in pertinent part, recites that on or about November 1, 1974 petitioner requested permission of the respondent Commission to transfer its distributorship of Wolfschmidt Vodka from Lipman Bros., Inc., in Nashville, Tennessee to the Tennessee Wine & Spirits Company in Nashville, and from Southern Distributors Corp., in Chattanooga, Tennessee, to Athens Distributing Company of Chattanooga.

It is averred that at its regular monthly meeting on January 10, 1975, held in Nashville, Tennessee, the Commission denied petitioner's request for the above-mentioned transfers of distributorships and it is alleged that said action was erroneous and illegal in that:

(a) It was arbitrary and not supported by material evidence.

(b) The laws of Tennessee do not confer on the Commission power to require its permission for the transfer of a distributorship by a manufacturer from one distributor to another and its rules and regulations which require its permission to make such transfer is an illegal effort to exercise legislative power.

(c) The denial of petitioner's request violates petitioner's rights under the Fifth and Fourteenth Amendments to the Federal Constitution and Article 1, Section 8, and Article 11, Section 8, of the Constitution of Tennessee, the same being an unconstitutional interference with the right of petitioner to contract freely.

Under these circumstances it is alleged that petitioner is entitled to have a Court declare its rights in the premises and to have a declaratory judgment to the effect that the action of the respondent Commission is void and, further, that petitioner is entitled to an injunction

restraining the Commission from attempting to interfere with petitioner's right to contract with such persons as it may choose.

The petition prays:

(1) For a writ of certiorari requiring respondents to file an accurate transcript and record of the proceedings involving petitioner's request above mentioned.

(2) That the Court determine and declare that the action of respondent Commission complained of was illegal and void as being in violation of the State and Federal Constitutions.

(3) That the Court determine and declare the rights of the parties in the premises and enter a declaratory judgment that the action of respondent Commission in the premises was illegal, arbitrary, beyond its jurisdiction and in violation of petitioner's constitutional rights.

(4) For a permanent injunction restraining and enjoining respondent Commission from attempting to enforce its rule requiring petitioner to seek and obtain permission to make the transfer of distributorships as above outlined; and,

(5) For general relief.

On April 4, 1975 defendant, Lipman Bros., Inc., filed a motion to dismiss the petition for certiorari and a similar motion was filed by Southern Distributors Corp.

On September 23, 1975, the Trial Judge held that the petition for certiorari should be dismissed. His Order states:

"The Court is of the opinion that the question raised by the complaint is properly before the Court in accordance with the prayer for a declaratory judgment. The writ of certiorari is unnecessary for consideration of all matters raised. The writ of

certiorari is a discretionary writ and should not be issued unless necessary.

It is, therefore, ORDERED that the writ of certiorari is dismissed as improvidently granted. The cause is retained for consideration of a declaratory judgment.

It is further ORDERED that the record before the Commission be retained as evidence for the use of any party."

The Tennessee Alcoholic Beverage Commission, hereinafter referred to as the Commission, filed its answer on October 22, 1975. Thereafter, Lipman Bros. and Southern Distributors Corp. filed their answers and Lipman Bros. filed interrogatories directed to Seagram Distillers.

On January 2, 1976 Seagram Distillers filed a motion for summary judgment and, on January 5th, filed its answers to the interrogatories.

The motion for summary judgment, pursuant to Rule 56, Tennessee Rules of Civil Procedure, asserts that the ground for such motion is that there is no genuine issue as to any material fact in this cause and that it presents a pure question of law and, further, that petitioner, as a matter of law, is entitled to a judgment to the effect that the action of the Commission in refusing permission to transfer certain wholesale distributorships, as alleged in the complaint, is void as being in excess of the lawful powers of that administrative agency or, alternatively, that such action denies the plaintiff rights guaranteed under the Constitution of the United States and the State of Tennessee.

Certain affidavits were filed in support of the motion and interrogatories and responses thereto were filed.

After a hearing the Court entered the following order:

"Order on Motion For Summary Judgment

This cause came on to be heard upon plaintiff's motion for summary judgment 'to the effect that the action of the Alcoholic Beverage Commission in refusing to it permission to transfer certain wholesale distributorships, as alleged in the complaint . . . is void as being in excess of the lawful powers of that administrative agency or, alternatively, that such action denied to the plaintiff rights guaranteed under the Constitution of the United States and the State of Tennessee.'

The action involved was taken pursuant to a regulation which was stipulated by all parties to be in these words:

'(7) Approval Required to Transfer to Another Wholesaler.—No manufacturer, importer or other person shall be permitted to transfer a brand from one wholesale distributor to another without written approval of the Commission. Requests for approval of a transfer must be submitted in writing and a copy of said request must at the same time be sent to the wholesale distributor in whose name the brand is then requested.

After due consideration, the Commission shall either approve or disapprove the transfer . . .'

If it be unclear, the above refers to the marketing of liquor and the word 'brand' refers to a particular brand of liquor.

The motion for summary judgment can only be granted if the above quoted regulation, read in conjunction with the statutes relating to liquor, is in violation of a Constitution on its face. The Court is of the opinion that the regulation does violate the due process clauses of both the Federal and State Constitutions.

A careful search of the statutes reveals no provision regulating the relationship between manufacturer and wholesaler. Nothing is required of the relationship. No standards for sales, contracts, or dealings are stated.

While the authority of the ABC to regulate on this subject might be inferred, this particular regulation, in its present form, cannot be upheld. A manufacturer has no way of knowing what conditions will permit or prevent a transfer. What will influence the decision of the Commission?

We say we have a government of laws and not men. Although some ridicule this principle, it is important and should be applied whenever possible. It is applied in this case for the regulation now stricken permits important rights and freedoms to be subjected to the personal whim of a Commissioner without standards or guideposts of any kind.

The motion for summary judgment is granted.

It appears to the Court that the maintenance of the status quo will not cause any irreparable loss. It is, therefore, ORDERED that, for the full protection of rights of appeal, the plaintiff will make no change in its distributor relationship for a period of sixty (60) days.

This decision is based upon the statutes, the stipulated regulation and principles of law. Therefore, an appeal is granted to the Supreme Court upon proper bonds being filed.

Enter this 12th day of January, 1976.

/s/James M. Swiggart
JUDGE"

Motions for a new trial were filed by the defendants and, pursuant to said motions, the order of the Court was

amended by including in full and regulation of the Commission which is in question, as follows:

"No manufacturer, importer or other person shall be permitted to transfer a brand from one wholesale distributor to another without written approval of the Commission. Requests for approval of a transfer must be submitted in writing and a copy of said request must at the same time be sent to the wholesale distributor in whose name the brand is then registered.

After due consideration, the Commission shall either approve or disapprove the transfer. If the Commission disapproves the transfer, the brand shall remain in status quo, and failure on the part of the manufacturer or importer so denied to ship his wholesaler a reasonable amount of the brand sought to be transferred will result in the withdrawal of approval of all its brands."

The order of the Court was further amended by providing that the Commission and its members be permanently enjoined from enforcing or attempting to enforce the foregoing regulation against plaintiff in connection with the transfers of distributorships complained of in the original petition.

- Assignments of Error -

Appellants, Lipman Bros., Inc., and Southern Distributor Corp., each filed five assignments of error which are essentially identical. The Commission filed four assignments which are, in substance, the same as four of the assignments filed by the other appellants. These assignments will be discussed together.

Assignment No. 1 by all three appellants is that the Court erred in failing to hold that the plaintiff is estopped to challenge the constitutionality of the

Commission Rule 0100-30.13(7) because of the Company's repeated acceptance of the rule's benefit in the past.

In support of this assignment, appellants assert that one who accepts a statute by acquiescing in it after its passage, or by accepting benefits under it is estopped to deny its validity, citing and relying on *Waldauer v. Britton*, 172 Tenn. 649, 113 S.W.2d 1178 (1938), where the Court quoted with approval from Am. Jur. as follows:

"The general rule, supported by many authorities, is thus stated in 11 American Jurisprudence, 767:

'Estoppel is most frequently applied in cases involving constitutional law where persons, in some manner, partake of advantages under statutes. The rule is well settled that one who voluntarily proceeds under a statute and claims benefits thereby conferred will not be heard to question its constitutionality in order to avoid its burdens.' "

In 16 Am. Jur. 2d, pp. 331-332, in discussing this question, it is said:

"Certainly such a person will not be allowed to retain his advantage or keep his consideration and then repudiate the act as unconstitutional. This principle applies also to questioning the rules or actions of state commissions.

From the foregoing discussion, the rule naturally develops that one who invokes the provisions of a law, in proceedings or otherwise, may be denied the right to question its constitutionality. Thus, one who brings a suit under a statute thereby concedes its validity."

It is also urged that the Alcoholic Beverage Commission is vested with broad powers to regulate alcoholic

beverages, which powers are further broadened by the fact that ordinary rules of construction do not apply to statutes regulating intoxicating liquor, citing *McCanless v. Klein*, 182 Tenn. 631, 188 S.W.2d 745, (1944); *McQueen v. McCanless*, 182 Tenn. 453, 187 S.W.2d 630, (1944); and *Terry v. Evans*, 189 Tenn. 345, 225 S.W.2d 255 (1949).

It is argued that the record shows that the regulation in question has been in effect for more than a quarter of a century and that as long ago as May, 1960, Seagram started switching distributors and on the last fourteen occasions prior to the matters involved in the case at bar changed its distributors of various alcoholic beverages and on each occasion the consent of the Commission, or its predecessor, the Commissioner of Finance and Taxation of Tennessee, was obtained for such transfers. The record also shows that over the past ten years Seagram has been sued on four occasions with respect to the transfer of distributorships.

It is argued by counsel for appellants that upon the hearing before the Commission plaintiff is shown to have presented its evidence on the merits of the cause and did not challenge the validity of the regulation. It is thus argued that Seagram, after having acquiesced in the validity of the regulation for more than twenty-five years and having accepted its benefits for that period of time, cannot now attack the validity of the regulation.

On the other hand, counsel for appellee argue that the doctrine of estoppel does not affect the right of a party who has obeyed the mandatory provisions of an administrative regulation to contest the validity of that regulation in a subsequent Court proceeding. It is forcefully argued that the power or authority of the administrative agency either exists or does not exist and that such authority may not be conferred upon an agency

by the conduct of the parties before it. See 2 Am. Jur. 2d, Administrative Law, §331; *East Ohio Gas Co. v. Federal Power Commission*, 173 F.2d 429 (1949), and *Union Electric Co. v. Federal Power Commission*, 326 F.2d 535 (1964).

It is pointed out that the doctrine of estoppel is an equitable one to be ordinarily applied where one party misrepresents the facts or misleads another with resulting detriment to the party who is misled and a benefit to the other party. 28 Am. Jur. 2d, Estoppel and Waiver, §27.

Jurisdiction cannot be conferred upon a Court by the party before it. *May hew v. Mayhew*, 52 Tenn. App. 459, 376 S.W.2d 324 (1963); *James v. Kennedy*, 174 Tenn. 591, 129 S.W.2d 215 (1939).

It is pointed out by counsel that the argument of appellants, if followed to its logical conclusion, means that any party who is required by an apparently valid regulation of an administrative agency to take some particular action and chooses to obey that regulation, does so at his peril in that, after he has obeyed that regulation by taking the action it requires, he may not subsequently be heard to question its validity. This would seem to place a burden upon any party required to take some action by an administrative regulation to contest its validity through litigation prior to his first act of obedience, otherwise he would be permanently barred from taking such action and this is true even though his first act of obedience may not have adversely affected his interest.

It must be remembered that the fundamental principle of Administrative Law as we know it in Tennessee is that a person affected by the rulings or regulations of an administrative body must first present his case to that body and seek relief and then, if the decision of that

agency is adverse to his interest, he has a right to seek a Court review of that decision.

In 2 Am. Jur. 2d, Administrative Law, §331, it is stated:

"An administrative agency cannot enlarge its own jurisdiction, nor can jurisdiction be conferred upon the agency by parties before it. Accordingly, it is held that deviations from any agency's statutorily established sphere of action cannot be upheld because based upon agreement, contract, or consent of the parties, nor can they be made effective by waiver or estoppel."

In 73 C.J.S., Public Administrative Bodies and Procedure, §116, it is said:

"A public administrative body has such adjudicatory jurisdiction as is conferred on it by statute. It may not acquire jurisdiction by estoppel or consent, and where it acts without jurisdiction, its orders are void."

In *East Ohio Gas Co. v. Federal Power Commission*, 173 F.2d 429 (1949), it was said that no actions of either party, either voluntary or involuntary, can confer jurisdiction where it otherwise does not exist. See also *Union Electric Co. v. Federal Power Commission*, 326 F.2d 535 (1964) where it was pointed out that jurisdiction of the subject matter cannot be conferred where none exists.

As shredding some light on this question, see *Polk County v. State Board of Equalization*, Tenn. App. (1972), 484 S.W.2d 49, where this Court, speaking through Judge Todd, affirmed the Chancellor's decision to the extent that it invalidated the Board's action and held that no waiver had taken place by the mere failure to raise this issue during the administrative proceedings.

As is pointed out in 28 Am. Jur. 2d., Estoppel and Waiver, §27, the doctrine of estoppel is based upon the grounds of public policy, fair dealing, good faith and justice and its purpose is to forbid one to speak against his own act, representations, or commitments to the injury of another who reasonably relied thereon and such an estoppel cannot arise against the party except when justice to the rights of others demands it.

In considering the case beforeus, the question of Seagram Distillers having accepted benefits under the questioned regulation provokes the inquiry as to the nature of the alleged benefits and we are unable to find in this record anything that would support the conclusion that Seagram did accept specific benefits under this regulation which, as an equitable proposition, would raise an estoppel as is contended by the appellants.

The benefits to the distributor of the questioned regulation are readily apparent but its restrictions on the producer are not shown to be beneficial to it.

As to *Waldauer v. Britton*, supra, hereinabove referred to and quoted from, the parties seeking relief in that case had clearly derived benefits from the statute which they were challenging and this benefit came in a very tangible form of pay received for their services, prestige, and other prerequisites of office which they had enjoyed under the statute. Also, it is to be noted that in *Waldauer* the Court was concerned with a challenge to the validity of a statute enacted by the Legislature as opposed to an administrative regulation with which we are concerned in the case at bar.

Counsel for appellee in this connection make the following plausible argument:

"Stripped of excess verbiage and unsupported contentions about imaginary 'benefits', the appellants' so-called 'estoppel' argument amounts to

nothing less than a claim that, if a firm has at some time abided by a purportedly valid regulation of an administrative agency and submitted an application to that agency to do something which, in the absence of such regulation, it would have had a clear right to do, and has received favorable action on that application, that firm may never be heard to question in Court the validity of such regulation."

On the whole, we are persuaded to believe that the doctrine of equitable estoppel should not be applied in the case at bar so as to prevent the plaintiff from seeking a declaration by the Court of its rights and duties with respect to the regulation in question. It results that Assignment No. 1 is overruled.

Assignment No. 2 is:

"The Trial Judge erred by deciding the constitutional questions raised herein on Seagram Distillers' motion for summary judgment because all facis material to the resolution of these questions were not admitted or established."

While the foregoing assignment was included in those filed on behalf of Lippman Bros. and Southern Distributors Corp., counsel for those two appellants do not discuss this assignment in their briefs and arguments. Said assignment is discussed by the Attorney General on behalf of the Commission.

It is pointed out that since the summary judgment is not intended to be a substitute for the trial of disputed fact issues, the Trial Court's role in passing upon a motion for summary judgment is only to determine whether there are any material issues of fact to be tried.

It is argued by counsel for the Commission that the Trial Court was in error when he granted the motion for summary judgment because there existed genuine issues of material facts concerning the manner in which the

Commission had applied its rule to Seagram Distillers. And, it is pointed out that many Courts, particularly the Federal Courts, treat summary judgments with great caution and it is argued by the Attorney General that the vagueness of the legal theory forming the basis of Seagram Distillers' complaint together with the lack of certainty of the legal basis of the Trial Court's opinion both indicate that a summary judgment was not proper in this stage of the proceedings.

The Trial Judge found that there were no material issues of fact before the Court and we are inclined to agree with him. A careful examination of the pleadings and the affidavits as well as the interrogatories filed in the cause show clearly that there are no genuine issues of fact with respect to the application on the part of the plaintiff for a transfer of distributorships and the action of the Commission in denying the request. The action of the Trial Judge in holding that the regulation was invalid is clearly stated by him in his decree as follows:

"The motion for summary judgment can only be granted if the above quoted regulation read in conjunction with the statutes relating to liquor is in violation of a Constitution on its face. The Court is of the opinion that the regulation does violate the due process clauses of both the Federal and State Constitutions.

A careful search of the statute reveals no provision regulating the relationship between manufacturer and wholesaler. Nothing is required of the relationship. No standards for sales, contracts, or dealings are stated."

The State chose not to put on any proof by way of affidavit or otherwise which controverts or disputes any allegation or statement of fact in the petition and supporting affidavits.

Under Rule 56.05 it is said that an adverse party may not rest upon the mere allegations or denials of his pleading but his response by affidavits or as otherwise provided in this rule must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

We find no error in the action of the Trial Judge in this respect; consequently, Assignment No. 2 is overruled.

Assignment No. 3 filed on behalf of *Lipman Bros. and Southern Distributors Corp.*, charges that the Court erred in holding as a matter of law that the regulation in question was unconstitutional as violative of the due process clauses of both the Federal and State Constitutions.

In the assignments filed on behalf of the *Commission Assignment No. 3* is that the Trial Court erred by ruling that the Alcoholic Beverage Commission and its regulatory predecessors had no statutory basis upon which to promulgate Rule 0100-3-.13(7), and *Assignment No. 4* is that the Trial Court erred in holding that the rule violated the State and Federal Constitutions.

The Trial Judge in his order sustaining the motion for summary judgment states:

"This cause came on to be heard upon plaintiff's motion for summary judgment 'to the effect that the action of the Alcoholic Beverage Commission in refusing to it permission to transfer certain wholesale distributorships, as alleged in the complaint . . . is void as being in excess of the lawful powers of that administrative agency or, alternatively, that such action denied to the plaintiff rights guaranteed under the Constitution of the United States and the State of Tennessee.' "

In sustaining said motion, the order states:

"A careful search of the statute reveals no provision regulating the relationship between manufacturer and wholesaler. . . . No standards for sales, contracts, or dealings are stated.

....

The motion for summary judgment is granted."

In the brief filed by the Attorney General on behalf of the Commission it is pointed out that a history of the State's method of regulating the purchase and sale of alcoholic beverages since the enactment of the Twenty-first Amendment is recounted in the case of *Chattanooga v. Tennessee Alcoholic Beverage Commission*, (Tenn. 1975), 525 S.W.2d 470. In the opinion in said case by Mr. Justice Henry it is pointed out that when the Legislature legalized the sale of alcoholic beverages on a local option basis in 1939, the Commission of Finance and Taxation was given broad regulatory powers including the power to promulgate and enforce rules and regulations. Under this authority, the Commissioner promulgated a number of rules, including the rule now designated as 0100-3-.13(7).

It is pointed out that the Court construed a related rule in 1945 in *McGanless v. Klein*, 182 Tenn. 631, 188 S.W.2d 745, and held that said rule as promulgated by the Commissioner was valid.

The regulation remained unchanged and was administered by the Commissioner until the creation of the Alcoholic Beverage Commission in 1963, whereupon, the Legislature transferred many of the Commissioner's duties with respect to alcoholic beverages to the Commission, including the power to promulgate rules.

In T.C.A. §57-109(3)(d), et seq., the Legislature went farther and authorized the Commission to promulgate

any and all of the regulations that had been in existence since 1939.

T.C.A. §57-819 provides:

"The Commission is hereby authorized to adopt and promulgate the present rules and regulations which are in existence pertaining to alcoholic beverages, and said Commission may in its discretion alter, amend or repeal any of such parts of said rules and regulations as it deems necessary."

Thus it is seen that the Legislature gave implicit approval to the rules governing the purchase and sale of alcoholic beverages which had already been promulgated prior to 1963.

It appears that on November 30, 1964, the Commission repromulgated Regulation 13:70 which was designated as Rule 0100-3-.13(7).

In *Richardson v. Reese*, 165 Tenn. 661, 57 S.W.2d 797, 799 (1933), the Court specifically approved the delegation of rule-making authority by the Legislature to administrative agencies, pointing out that with the growing complexity of modern life and increased difficulty of administering the laws, the delegation of more and more power by the Legislature to administrative agencies has become necessary and has gained the approval of the Courts. Also see *Department of Public Welfare v. Natl. Help "U" Assn.*, 197 Tenn. 8, 270 S.W.2d 337 (1954); *Tasco Corp. v. Long*, 212 Tenn. 96, 368 S.W.2d 65 (1968) and other cases.

In *McCanless v. Klein*, supra, the validity of a very similar regulation was upheld. In said case the validity of a regulation promulgated by the Commissioner of Finance and Taxation concerning the distribution of liquor was involved, said regulation being as follows:

"From and after the effective date of this regulation no wholesale liquor distributor shall add an additional brand to his stock without first securing the written approval of the Commissioner."

It will be seen that this regulation had substantially the same effect as does the regulation in question in the case at bar since it appears that there would be no practical difference in requiring Seagram Distillers to obtain permission to change distributors and in requiring new distributors to secure written permission of the Commission to add additional lines to their stock.

In an opinion by Justice Chambliss, the Court stated:

"We are constrained to differ with the learned Circuit Judge, who holds this regulation, directed exclusively to the conduct of the liquor business, to be unreasonable, not within the police powers of the State, not conducive to the public health, welfare and morals, and tending to create monopolies in violation of the Constitution and statutes and, therefore, void.

It is difficult to conceive of a regulation of the sale and distribution of intoxicating liquor which could be said to be beyond the police powers of the State. Since the power of the State to prohibit such sales altogether is beyond question, no provision for its regulation is beyond the State's power. The holding of the Circuit Judge apparently fails to recognize that, as we said in *Wright v. State*, 171 Tenn. 628, 106 S.W.2d 866, quoted and re-affirmed in *Huffer v. State*, 178 Tenn. 644, 646, 162 S.W.2d 381, 382, 'A license to sell liquor is not a contract by right of property but is merely a temporary permit to do that which would otherwise be unlawful.' Or, as expressed in *Henderson v. Grundy County Beer Committee*, 176 Tenn. 397, at page 402, 141 S.W.2d 901, at page 908, such a license 'is in the nature of a mere permit which creates no

vested or property rights, and the traffic is at all times subject to the control of the State, . . . in the exercise of the police power.'

Ordinary rules of construction of statutes and ordinances with respect to their reasonableness do not strictly apply. The Legislature has unlimited powers of regulation and restriction of the liquor traffic and may delegate these powers, as has been done to the Commissioner. His exercise of such delegated discretion will not be lightly interfered with by the Courts."

It is pointed out in the opinion that the regulation in question requires registration of all brands sold by a dealer and forbids sale or transfers to any dealer of any brand without such registration and the obtaining of a permit therefor and that it is easy to conceive that such provisions will help to keep track of the liquors distributed by tracing responsibility when necessary and in collecting taxes thereon. It is also pointed out that the regulation provides an additional means of identification so essential to efficient administration.

In *Terry v. Evans*, 189 Tenn. 345, 225 S.W.2d 255, the Court stated that no provision for regulation of sale and distribution of intoxicating liquors is beyond the State police power.

We regard the foregoing authorities as being conclusive of the question raised by Assignment No. 3 by Lipman Bros. and Southern Distributors Corp., and Assignments Nos. 3 and 4 by the Commission, and these assignments are sustained.

Lipman Bros. and Southern Distributors Corp. Assignment No. 4 is that the Court erred in holding as a matter of law that the authority of the Alcoholic Beverage Commission was not broad enough to permit it to adopt the regulation in question in its present form.

For reasons set forth hereinabove with reference to Assignment No. 3 of the appellants, this assignment is sustained.

Lippman Bros. and Southern Distributors Corp. Assignment No. 5 is that the Court erred in failing to stay the effect of its order in the event of an appeal until the appeal was finally disposed of in the Appellate Courts.

In view of the fact that on application Chief Justice Fones entered an order to the effect that the injunction permanently enjoining the Commission from enforcing the regulation at issue in this cause against the plaintiff in connection with the proposed transfer of distributorships is stayed until further orders of the Court, it becomes unnecessary to pass upon the foregoing assignment.

For the reasons hereinabove set forth, the judgment of the Trial Court is reversed and the cause is remanded for such other and further proceedings as may become necessary and proper in the premises.

REVERSED AND REMANDED.

/s/Thos. A. Shriver
THOS. A. SHRIVER
PRESIDING JUDGE

TODD, J., CONCURS

DROWOTA, J., NOT PARTICIPATING

COURT OF APPEALS, NASHVILLE

SEAGRAM DISTILLERS COMPANY, A
Division of JOSEPH E. SEAGRAM &
SONS, INC.,

Appellee

Vs.

CARL A. JONES, ET AL, COMPRISING
THE ALCOHOLIC BEVERAGE COM-
MISSION OF THE STATE OF TENN-
ESSEE; E. LEE HYDEN, DIRECTOR
OF THE ALCOHOLIC BEVERAGE
COMMISSION OF THE STATE OF
TENNESSEE: LIPMAN BROS. INC.;
and SOUTHERN DISTRIBUTORS
CORP.,

Davidson
Law

Reversed
and
Remanded.

Appellants

This cause coming on to be heard upon a transcript of the record from the Circuit Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the Court below be reversed and that the cause is remanded to the Circuit Court of Davidson County for such other and further proceedings as may become necessary and proper in the premises, and for the collection of the costs of the cause below; for all of which, let procedendo issue.

The costs of the appeal will be paid by Seagram Distillers Company, a Division of Joseph E. Seagram & Sons, Inc., for which execution may issue if necessary.
9/3/76.

APPENDIX C

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

SEAGRAM DISTILLERS COMPANY,
Petitioner,

v.

CARL A. JONES, ET AL.,
Respondents.

DAVIDSON LAW

O R D E R

Upon consideration of the petition for certiorari and reply thereto, briefs of counsel and the entire record, the Court is of the opinion that the petition for certiorari should be and the same is hereby at the cost of the Petitioner.

PER CURIAM

APPENDIX D

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION
SITTING AT NASHVILLE

SEAGRAM DISTILLERS COMPANY, a Division of
JOSEPH E. SEAGRAM & SONS, INC.,
Appellant,

v.

CARL A. JONES, S. J. KING, and FRANK W.
PHILLIPS, Comprising the ALCOHOLIC BEVERAGE
COMMISSION OF THE STATE OF TENNESSEE; E.
LEE HYDEN, Director of the ALCOHOLIC BEV-
ERAGE COMMISSION OF THE STATE OF TENN-
ESSEE; LIPMAN BROS., INC., and SOUTHERN
DISTRIBUTORS CORP.,

Appellees.

Davidson Law
No. B-16415

NOTICE OF APPEAL FO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Joseph E. Seagram & Sons, Inc., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of Tennessee, reversing the decision of the Circuit Court of Davidson County, Tennessee granting to the Appellant, Joseph E. Seagram & Sons, Inc. a summary judgment in this action, which judgment was entered in this action on September 3, 1976 and which became final upon the

Order of the Supreme Court of Tennessee denying this Appellant's Petition for Certiorari, which Order was entered on February 7, 1977.

This appeal is taken pursuant to 28 USCA §1257(2).

GULLETT, STEELE, SANFORD,
ROBINSON & MERRITT

/s/Thomas Wardlaw Steele
Thomas Wardlaw Steele

/s/Joel M. Leeman
Joel M. Leeman

[Certificate of Service Omitted in Printing]
